W4444444444444444444444444444444444444444444444444444U

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication. Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Litton Industrial Automation Systems, Inc., New Britain Machine Division	)	TSCA Appeal No. 93-4
Docket No. TSCA-I-89-1042	)	

[Decided January 27, 1995]

FINAL DECISION

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

W4444444444444444444444444444444444444444444444444444U

LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC.,
NEW BRITAIN MACHINE DIVISION

TSCA Appeal No. 93-4

FINAL DECISION

Decided January 27, 1995

Syllabus

In this appeal, Litton Industrial Automation Systems, Incorporated ("Litton") challenges the Initial Decision and Order of the Presiding Officer in which a civil penalty of $36,000.00 was assessed for violations of Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615. This matter arises from a complaint filed by U.S. EPA, Region I in which Litton was charged with failure to properly mark and store polychlorinated biphenyls ("PCBs") at its New Britain, Connecticut facility.

Litton contends that the Presiding Officer erred when he admitted into the record evidence obtained from the Litton plant during a TSCA inspection. Specifically, Litton claims that the State employees, who conducted the TSCA inspection on behalf of Region I, were not proper EPA representatives under Section 11 of TSCA, 15 U.S.C. 2610. In addition, Litton argues that the search was invalid under Section 28 of TSCA, 15 U.S.C. 2627, on the grounds that EPA did not have the authority to provide federal funds to the State for the purpose of conducting the subject TSCA inspection on behalf of EPA. Finally, Litton contends the search also violated the Fourth Amendment of the U.S. Constitution.

Held: Regardless of Litton's statutory arguments, Litton's voluntary consent to a TSCA inspection by State employees eliminated any Fourth Amendment objection Litton may have had to the admission of the evidence at the administrative hearing. Moreover, Litton's statutory arguments are without merit. First, the plain language and judicial interpretation of TSCA, Section 11(a) clearly authorize the Administrator to "duly designate" State employees to serve as TSCA inspectors on behalf of EPA. Second, Litton's argument that Section 28 bars the use of federal funds to support TSCA inspections by State employees is not supported by the language or legislative history of Section 28.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

Litton Industrial Automation Systems, Incorporated ("Litton") has appealed from an Initial Decision and Order issued by Administrative Law Judge Frank W. Vanderheyden ("Presiding Officer"), in which the Presiding Officer assessed a civil penalty of $36,000.00 against Litton for violations of Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615. The initial decision arises out of an action brought by the U.S. Environmental Protection Agency ("EPA"), Region I in which Litton was charged with failing to properly mark and store polychlorinated biphenyls ("PCBs") at its New Britain, Connecticut plant.[1]

[1] In particular, Litton was charged with numerous failures to mark and store PCBs pursuant to the requirements contained in 40 C.F.R. Part 761.

Litton's sole contention on appeal is that the Presiding Officer erred in admitting into the record the evidence taken from the Litton facility during a 1988 TSCA inspection. More specifically, Litton claims that the State employees who conducted the 1988 TSCA inspection on behalf of Region I, were not proper EPA representatives under TSCA, Section 11, 15 U.S.C. § 2610,[2] and thus none of the evidence obtained from that inspection should have been considered at the hearing.

The Board has reviewed the record herein. For the reasons set forth below, the Initial Decision and Order is affirmed.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

The sole dispute in this appeal centers on the validity of the inspection that gave rise to the enforcement action. In that connection, the facts surrounding the inspection, set forth below, are not contested.

In September 1988, two Connecticut Department of Environmental Protection ("DEP," "State") field inspectors arrived at Litton's New Britain facility to conduct a TSCA inspection. Upon arrival, they were met by Litton plant engineer William Lindsay. Both DEP employees presented their credentials. In addition, one of the inspectors, Frank Bartolomeo, presented an EPA form stating that he was a "duly designated representative" of the EPA authorized to conduct TSCA inspections under Section 11 of TSCA. The Litton plant engineer was then presented with a TSCA Notice of Inspection which provided that the inspection would be limited to examining Litton's compliance with the applicable TSCA-PCB regulations. The plant engineer, raising no objection, signed the notice form and the inspection commenced.

In May 1989, EPA filed a nine-count complaint against Litton based upon the evidence obtained from the September 1988 inspection. In its answer

---

[2] In pertinent part, TSCA § 11(a) provides:

> (a) IN GENERAL.--For purposes of administering this Act, the Administrator, and any duly designated representative of the Administrator, may inspect any establishment, facility, or other premises in which chemical substances, mixtures, or products subject to title IV are manufactured, processed, stored, or held before or after their distribution in commerce . . . .

15 U.S.C. § 2610(a).

Litton denied or stated it lacked knowledge as to each allegation and asserted several affirmative defenses, including: (1) the persons who inspected the New Britain facility were not proper representatives of the EPA under Section 11 of TSCA, thus any evidence obtained from the inspection was done so illegally; and (2) the consent given by the plant engineer was invalid because it was based on his misunderstanding of the inspectors' authorization to conduct the TSCA inspection.

Thereafter, on February 12, 1990, Litton filed a Motion *in Limine* seeking to suppress the evidence obtained by the DEP inspectors on the grounds that it was obtained in violation of Section 11 of TSCA and therefore was inadmissible at the hearing. Litton further argued that the search violated the Fourth Amendment of the United States Constitution on the grounds that it was a warrantless search conducted by unauthorized inspectors.

After a number of oppositions and responses were filed, the Presiding Officer, on October 25, 1990, issued a twenty-page order denying Litton's motion, thereby allowing Region I to rely upon the evidence obtained by the DEP inspectors. In the order, the Presiding Officer determined, based upon the plain meaning and legislative history of Section 11 of TSCA, that EPA has broad authority under Section 11 to designate State employees as EPA representatives for the purpose of conducting inspections. As such, the Presiding Officer also found Litton's Fourth Amendment argument legally insufficient in that he concluded the September 1988 inspection was, in fact, authorized. Accordingly, Litton's affirmative defenses relating to Section 11 and the Fourth Amendment were struck. The matter was later set for a hearing for January 29, 1991.

On Tuesday, January 29, 1991, Litton and Region I appeared before the Presiding Officer for a one-day hearing on this matter. Each party called three witnesses. Among Region I's witnesses were Mr. Bartolomeo and Thomas RisCassi, the Connecticut DEP official who accompanied Mr. Bartolomeo on the Litton inspection.[3]

In September 1993, the Presiding Officer filed an Initial Decision and Order finding Litton liable as to all nine counts alleged in the complaint. As

---

[3] William Lindsay, the Litton plant engineer did not testify at this hearing.

noted, a civil penalty of $36,000.00 was assessed. In October 1993, Litton filed a timely Notice of Appeal and an Appellate Brief pursuant to 40 C.F.R § 22.30.[4]

II. *DISCUSSION*

On appeal, Litton argues that the September 1988 inspection of its New Britain facility was unauthorized because Section 11 of TSCA does not allow EPA to designate State employees to conduct TSCA inspections and thus, the evidence obtained during the September 1988 inspection was obtained in violation of TSCA and the Fourth Amendment. Accordingly, Litton contends the evidence should not have been admitted into the record. While the Board will address Litton's TSCA arguments later in its opinion, it will first address the threshold issue of whether Litton's actions in consenting to the search resulted in a waiver of Litton's Fourth Amendment objections to the admissibility of the evidence.

A. Consent

It is well settled that a warrantless search conducted with voluntary consent does not violate the Fourth Amendment.[5] *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).[6] The constitutional question of whether the consent to a search was in fact "voluntary" or was the product of duress or trickery, express or implied, is a question of fact to be determined from "the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227.

---

[4] The Board also granted the request of Lazarus, Incorporated ("Lazarus") to file an *Amicus Curie* brief. Lazarus, which filed its brief in June 1994, is presently a respondent in an administrative penalty proceeding where it has raised the same Section 11(a) issue as that raised by Litton in this appeal.

[5] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

[6] "It is * * * well settled that one of the specifically established exceptions to the [Fourth Amendment] requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth*, 412 U.S. at 219 (citations omitted).

Here, an examination of the totality of the circumstances leaves no doubt that Litton voluntarily consented to the September 1988 inspection. It is not disputed that the plant engineer, Mr. Lindsay, signed the notice form which identified the purpose of the inspection. Indeed, he even brought the inspectors to Litton's inventory of PCB equipment before the inspection began. Complainant's Response to Respondent's Motion *in Limine* at 14. Moreover, there is nothing in the record to suggest any hint of duress or trickery on the part of the inspectors. The inspectors clearly identified themselves and the purpose of the inspection. Litton has not provided any evidence to show that the inspectors gained entry to the facility by way of a ruse, or that they lied about who they were.[7]

Under these circumstances, Litton cannot successfully contest the validity of the inspection, nor the admission of the evidence gathered at that inspection. So long as the plant engineer's consent to a search by State employees was voluntary, Litton's Fourth Amendment rights were not violated. Litton's contention that the State agents were not properly authorized to conduct the search under TSCA, Section 11 therefore misses the mark.[8] For the purpose of Litton's Fourth Amendment argument, it is not significant whether the agents were "duly designated" inspectors under TSCA.

In this context, the case at bar is strikingly similar to *In re Electric Service Company*, TSCA Appeal No. 82-2 (CJO, January 7, 1985). In *Electric Service Company*, the appellant challenged the admission into the administrative

---

[7] The September 1988 inspection is in marked contrast to the example of government trickery which is discussed at length in *United States v. Bosse*, 898 F.2d 113 (9th Cir. 1990). In *Bosse*, a State official went to the defendant's home to inspect the premises as part of the application process for a firearms license. A United States Alcohol, Tobacco and Firearms ("ATF") agent accompanied the State official on the search. The State official and the ATF agent, who went along for the sole purpose of observing things of interest to ATF, deliberately failed to identify the ATF agent. Several days later, the ATF agent obtained a search warrant based upon his observations and proceeded to search the defendant's home.

The Court of Appeals held that the officers' silence amounted to a deliberate misrepresentation of the ATF agent's reason for being at the defendant's home. Finding a Fourth Amendment violation, the Court said, "A ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent." *Bosse*, 898 F.2d at 115 (citations omitted).

[8] As we discuss in greater detail *infra*, Section B, the Presiding Officer nonetheless was correct in concluding that the Agency may properly rely on State inspectors to perform TSCA inspections.

record of evidence obtained from a TSCA inspection conducted at the request of EPA by two State officials who did not present a proper notice of inspection and were not properly authorized under the statute. The Chief Judicial Officer, in upholding the admissibility of the evidence obtained from the search, held that the appellant had consented to the inspection when the appellant's sales manager gave the inspectors permission to enter the facility and assisted the inspectors as they conducted the inspection. The sales manager's actions, the Chief Judicial Officer concluded, operated as a waiver of appellant's right to challenge the admission of the evidence. *See id.* at 9. Therefore, the Chief Judicial Officer held the evidence was properly admitted into the record. The Board sees no reason why the same result should not apply here, where the notice procedures were followed and at least one inspector presented his EPA designation.

For all the above-mentioned reasons, the Board concludes that the evidence obtained from the September 1988 inspection by State employees was properly admitted and considered at the hearing.[9]

B. TSCA

In view of our conclusions regarding Litton's consent, it is not necessary to consider Litton's statutory arguments. However, in light of the substantial analysis given by both the Region and Litton to the question of EPA's statutory authority to designate State employees as TSCA inspectors under Section 11 of TSCA, we choose to address those arguments as well. In brief, we find for the

---

[9] Even if this search amounted to an invalid warrantless search it is not a certainty that the Fourth Amendment would require the evidence to be suppressed. The exclusionary rule was created by the federal courts to deter Fourth Amendment violations in criminal cases and has not been extended to all administrative proceedings. *In re Boliden-Metech, Inc.*, TSCA Appeal No. 89-3, at 8, n.5 (CJO, November 20, 1990).

> The courts have applied a balancing test in each case, weighing the deterrent effect of suppressing unlawfully obtained evidence against the social cost of depriving the government of the use of the evidence. * * * the Supreme Court has stated in dictum that the social cost of applying the exclusionary rule is unacceptably high in situations involving continuing environmental violations. It states, for example that "[p]resumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained * * *."

Id. (Citations omitted.)

reasons set forth below that the search conducted by the Connecticut DEP employees was properly authorized under TSCA.

As noted above, Section 11(a) of TSCA provides in pertinent part:

> For purposes of administering this Act, the Administrator, and **any duly designated representa-tive of the Administrator**, may inspect any establish-ment, facility, or other premises in which chemical substances, mixtures, or products subject to title IV are manufactured, processed, stored or held . . .

15 U.S.C. § 2610(a) (emphasis added). Although TSCA does not define "duly designated representative," we conclude based on the plain language of TSCA that EPA may properly designate State employees to serve as "duly designated representatives."

Section 11(a) plainly authorizes the Administrator or "**any**" person so designated by the Administrator to conduct TSCA inspections for the purpose of carrying out the goals of the statute. The language of Section 11(a) is broad, unrestrictive and unambiguous. As the Presiding Officer noted, the word "any" defines the scope of the Administrator's authority. Order, slip op. at 9. "Any" suggests an unencumbered choice to select from a particular pool. *Id.* The Section's only restriction is that the party be "duly designated." *Id.* at 10. Thus, any person who has received a proper designation from EPA can become a "duly designated" TSCA inspector. Accordingly, Section 11(a) by its terms provides EPA with ample authority to designate State officers to conduct TSCA inspections.[10]

Although judicial interpretation of this section is sparse, the one case construing Section 11(a) supports EPA's view. In *Aluminum Company of America v. DuBois*, No. C80-1178V (W.D.Wash. June 11, 1981) ("*Alcoa-*

---

[10] In this connection, we note that the legislative history regarding Section 11(a) does not discuss the phrase "duly designated representative." The language used in the original House and Senate bills is, however, very similar to the language used in the statute: " * * * the Administrator or any representative of the Administrator duly designated by the Administrator * * *." H.R. 14032 94th Cong., 2d Sess., 297 (1976); S. 3149 94th Cong. 2d Sess., 59 (1976). Thus, there is nothing in the legislative history to suggest that EPA is limited in any way in designating State officials as TSCA inspectors.

DuBois"), Alcoa brought an action to bar private contractors engaged by EPA from conducting a TSCA inspection at Alcoa's Vancouver, Washington plant. In granting the Agency's motion for summary judgment, the court held that "the phrase `duly designated representative' means more than just officers and employees of EPA and includes duly designated private contractors." *Alcoa-DuBois*, slip op. at 6. We believe that if Section 11(a) authorizes the use of private contractors, it certainly authorizes the designation of State inspectors.[11]

Despite the plain language and judicial interpretation of Section 11(a), Litton makes two arguments to support its claim that State officials may not serve as TSCA inspectors. First, Litton argues that because EPA does not have the authority in TSCA that it has in other environmental statutes to either "delegate" or "authorize" State officials to carry out the Agency's TSCA obligations, the "designation" of State inspectors is unlawful as an impermissible "delegation." Second, Litton argues that Section 28(a) of TSCA, 15 U.S.C. § 2627(a), precludes EPA from giving to States any federal funds for the purpose of conducting inspections that only EPA employees can lawfully perform under TSCA. As discussed below, Litton's arguments are based on the erroneous assumption that EPA's "designation" of State officials to conduct TSCA inspections is tantamount to an improper federal "delegation" of a State TSCA program and an impermissible relinquishment of EPA's TSCA inspection authority.

Litton correctly notes that in contrast to many other environmental laws, TSCA does not give EPA the authority to "delegate" or "approve" a State toxic chemical control program that will operate *in lieu* of an EPA program. Thus, States cannot be given primary responsibility over the federal TSCA program, as States with "approved" or "delegated" programs do under the Clean Air Act ("CAA"), the Clean Water Act ("CWA"), and the Resource Conservation and Recovery Act ("RCRA").[12]

---

[11] We note in this regard that Litton's reliance on the two Clean Air Act ("CAA") cases dealing with EPA's use of private contractors is not relevant to the present case. The holdings in *United States v. Stauffer Chemical Company*, 684 F.2d 1174 (6th Cir. 1982), *aff'd* 464 U.S. 165 (1984) and *Bunker Hill Company v. U.S. EPA*, 658 F.2d 1280 (9th Cir. 1981) rest on each court's interpretation of the lengthy legislative history of Section 114 of the CAA. Whether Section 114 of the CAA does or does not permit private contractors to serve as CAA inspectors has no bearing on EPA's TSCA inspection authority, given the plain meaning and judicial interpretation of Section 11(a) of TSCA.

[12] Under Section 111(c) of CAA, EPA may **delegate** its authority to implement and enforce federal new source performance standards. See 42 U.S.C. 7411(c). Accordingly, under Section

(continued...)

However, contrary to Litton's assertions, EPA's authority to "designate" State employees to serve as TSCA inspectors under Section 11 of TSCA cannot be construed in any way as a "delegation," or an "authorization" of a State program. The "designation" of State inspectors has not authorized the State to act "in lieu of," or "in the place of" EPA. To the contrary, when EPA designates a State employee to serve as a TSCA inspector, the State employee is not acting for the State, but rather for EPA. This designation is simply intended to provide assistance to EPA as it carries out its enforcement obligations under the Act. EPA never relinquishes federal authority when it designates State inspectors under TSCA. The Agency retains ultimate control and discretion with respect to any enforcement decision arising from such inspections. Accordingly, this "designation" of State inspectors to conduct federal TSCA inspections is perfectly consistent with the retention of EPA's authority under the Act. For these reasons, Litton's contention that the designation of State employees is an unlawful delegation of EPA authority must fail.

Likewise, Litton's argument regarding Section 28 of TSCA must fail. Contrary to Litton's contention, Section 28 does not limit EPA's authority under Section 11(a). Litton's argument that the federal funds provided to the States under Section 28 and used for the subject inspection could not be used for anything other than the support of a Connecticut program separate and apart from EPA's TSCA program is without merit. First, as Region I correctly notes, the language of Section 28 makes clear that federal funds can be used for activities that "complement" EPA's efforts, as well as for separate State efforts. In particular, Section 28 states:

---

[12](...continued)
114(b), CAA permits a formal **delegation** of federal inspection authority if the State's procedures are deemed adequate. See 42 U.S.C. § 7414(b).

Under CWA, a State desiring to administer its own permit program for discharges into water in its jurisdiction may submit for EPA **approval** a plan for establishing and administering such a program under State law. See 33 U.S.C. 1342(b). If EPA finds that the State's laws require as much as CWA in enforcement and monitoring, the State is **authorized** to apply State enforcement procedures for point sources in its jurisdiction. See 33 U.S.C. § 1318(b).

Under RCRA, a State upon EPA **authorization** may establish and enforce a hazardous waste program, provided it is equivalent to the EPA program. See 42 U.S.C. 6926(b). If the State program is authorized, the State, acting **in lieu of** EPA, may inspect premises for the purpose of the Act. See 42 U.S.C. § 6927(a).

> (a) IN GENERAL.--For the purpose of complementing (but not reducing) the authority of, or actions taken by, the Administrator under this Act, the Administrator may make grants to States for the establishment and operation of programs to prevent or eliminate unreasonable risks within the States to health or the environment which are associated with a chemical substance or mixture and with respect to which the Administrator is unable or is not likely to take action under this Act for their prevention or elimination.

15 U.S.C. § 2627(a). Region I argues that Congress' use of the word "complement" reveals its intent concerning the grant program. In particular, while not defined in TSCA, "complement" is commonly defined as "something that completes, makes up a whole, or brings to perfection." Webster's II New Riverside University Dictionary 290 (1994). Region I, therefore, argues that by its plain terms, Section 28 allows EPA to utilize State employees to conduct inspections that will enable EPA to fulfill the overall goals of the Act.

Second, there is nothing in the legislative history that suggests Region I's interpretation of Section 28 is erroneous. Litton states that the legislative history accompanying Section 28 indicates that EPA may not use Section 28 funds for the purpose of surrendering any of its enforcement responsibilities under TSCA. In support of its assertion, Litton relies on statements by Representative Maguire of New Jersey, the sponsor of the Section 28 amendment. In particular, Representative Maguire remarked:

> Concern has been expressed that this provision might represent a "foot in the door"' whereby the Environmental Protection Agency might take advantage of the grant program to pass some of its testing, monitoring , and enforcement responsibilities on to State agencies. This amendment has been carefully drafted to explicitly eliminate such a possibility."

122 Cong. Rec. 27,201 (1976). Contrary to Litton's assertions, however, other statements by Representative Maguire make it clear that federal money could be provided to the States to assist EPA in carrying out EPA's responsibilities under the statute:

> The grant money is earmarked for use in ways which will complement the activities already underway or being planned

> by EPA for the implementation of this Act and for activities which the Administrator is **unable to undertake**, because of inadequate resources or other **higher priorities**. It is not intended to and will not replace, EPA's authority to require reporting, testing, or any other of the authorities given in this act.

Id. (Emphasis added.) Thus, while EPA cannot use Section 28 funds to relinquish its responsibilities to the States, the legislative history makes it clear that EPA may give federal monies to States for the purpose of helping EPA fulfill responsibilities that by virtue of "higher priorities," EPA would not be able to undertake. We do not read the legislative history as in any way limiting EPA's authority to designate State employees to serve as EPA inspectors.

As noted above, Section 28 allows EPA to give grants to States for the purpose of supplementing EPA's program. As such, Section 28 contemplates that grant money will be available to conduct inspections that promote EPA's goals with respect to the PCB program, as was done here. For these reasons, Litton's Section 28 argument does not provide us with any basis for setting aside the Presiding Officer's decision.[13]

III. *CONCLUSION*

In view of the foregoing, the Board concludes that the Presiding Officer properly admitted and considered the evidence gathered by the Connecticut State

---

[13] At this juncture, the Board should note the Request of *Amicus Curiae* to File Supplement to Brief in Support of Appellant, filed by *Amicus Curiae* Lazarus on December 16, 1994. While the Board is denying Lazarus' request, it will take official notice of the September 1994 U.S. General Accounting Office report entitled "Toxic Substance Control Act - Legislative Changes Could Make the Act More Effective." The report states that Congress was greatly concerned about federal authority in TSCA, particularly in the area of inspections where confidential business information ("CBI") could be gathered. However, nothing in the report suggests that Congress did not authorize EPA to designate State inspectors to work on EPA's behalf under TSCA.

Additionally, the report notes that State governments are not entitled to access to CBI obtained by EPA under TSCA. But as we mentioned *supra*, when EPA designates a State employee to be a TSCA inspector, the State employee becomes an EPA agent collecting the evidence for EPA, not the State, and is thus bound by any limitations imposed upon EPA employees in handling any CBI data.

employees from the September 1988 TSCA inspection of Litton's New Britain, Connecticut facility.

Therefore, the Initial Decision and Order is affirmed. Litton is assessed a civil penalty of $36,000.00. Payment of the full amount of the penalty shall be made by forwarding a cashier's or certified check payable to the Treasurer of the United States, to the following address within sixty (60) days of the date of service of this decision:

EPA -- Region I
Regional Hearing Clerk
P.O. Box 360903M
Pittsburgh, PA 15251

So ordered.